

**King Soopers, A Division of Dillon Companies, Inc.  
and Dean M. Fizer. Case 27-CA-6599**

August 27, 1981

**DECISION AND ORDER**

BY MEMBERS FANNING, JENKINS, AND  
ZIMMERMAN

On January 26, 1981, Administrative Law Judge Richard J. Linton issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in opposition to Respondent's exceptions and in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,<sup>1</sup> and conclusions<sup>2</sup> of the Administrative Law

<sup>1</sup> Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

<sup>2</sup> The Administrative Law Judge found, *inter alia*, that Respondent's conduct following Dean Fizer's application for reemployment on August 14, 1979, violated Sec. 8(a)(3) and (1) of the Act. The Administrative Law Judge found that Respondent's conduct constituted a refusal to rehire Fizer. Although we affirm the Administrative Law Judge's finding of a violation, we find that Respondent unlawfully refused to consider Fizer's application for employment. See *Pierce Governor Company, Division of Avis Industrial Corporation*, 243 NLRB 1009 (1979), especially fn. 3 of the Administrative Law Judge's Decision. Accordingly, we shall modify the Order recommended by the Administrative Law Judge to provide the proper remedy as established in Board precedent. See *Apex Ventilating Co., Inc.*, 186 NLRB 534 (1970). In finding that Respondent unlawfully refused to consider Fizer's application, we rely particularly on Respondent Warehouse Manager Richard Bock's statement to Fizer on September 13, 1979, that it was going to be "damn hard, in fact almost impossible," for Fizer to get rehired "with [Fizer's] position as vice president of the local union and the conditions and the way things are within the union right now." Rather than establishing an illegal refusal to hire, however, we think the above comment establishes an illegal refusal to consider for hire especially in light of the further fact that Respondent was not then hiring employees from the outside. In finding that Respondent violated the Act, however, we do not rely on the Administrative Law Judge's finding that Respondent "shamed" Fizer in his role as business agent in front of his stewards, when, during a meeting, Respondent requested Fizer to withdraw the Union's unfair labor practice charge against Respondent. In addition, we do not rely on the Administrative Law Judge's speculation about the significance of Garage Supervisor Steve Large's statement that "we'd got rid of the troublemaker."

In the section of his Decision entitled "The Remedy," the Administrative Law Judge inadvertently misstated a date relevant to Respondent's duty to offer Fizer employment. The Administrative Law Judge stated that date as August 14, 1980. We hereby correct the reference to the date to August 14, 1979.

Judge and to adopt his recommended Order, as modified herein.<sup>3</sup>

**ORDER**

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, King Soopers, A Division of Dillon Companies, Inc., Denver, Colorado, its officers, agents, successors, and assigns, shall take the action set forth in said recommended Order, as so modified:

1. Substitute the following for paragraph 1(b):

"(b) Discouraging membership in, or activities as an officer or staff representative of, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 435, or any other labor organization, by unlawfully refusing to consider job applicants for employment or discriminating against employees in any other manner with respect to their hire or tenure of employment in violation of Section 8(a)(3) of the Act."

2. Substitute the following for paragraph 2(a):

"(a) Offer Dean M. Fizer immediate employment, without prejudice to his seniority or other rights and privileges, in the same or a substantially equivalent position to which he would have been employed if employed absent the discrimination against him, and, if no such position has become available since August 14, 1979, place Dean M. Fizer on a preferential hiring list and offer him the first such position that becomes available, and make him whole for any loss of pay he may have suffered by reason of Respondent's unlawful refusal to consider him for employment in accordance with the recommendations set forth in the section of the Administrative Law Judge's Decision entitled 'The Remedy.'"

3. Substitute the attached notice for that of the Administrative Law Judge.

<sup>3</sup> Member Jenkins would provide interest on the backpay award in accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980). He also regards *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), cited by the Administrative Law Judge, as inapplicable here because as the Administrative Law Judge pointed out (fn. 39) Respondent asserted no legitimate reason for the refusal to consider Fizer for employment; failure to offer to rebut a *prima facie* case loses the case; and this longstanding principle is not affected by *Wright Line*.

## APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

- To engage in self-organization
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
- To refrain from the exercise of any or all such activities.

Accordingly, we give you these assurances:

WE WILL NOT tell job applicants that it will be very difficult if not impossible for them to be rehired by us because of their past functions as officers or staff representatives of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 435, or any other labor organization.

WE WILL NOT discourage membership in, or activities as an officer or staff representative of, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 435, or any other labor organization, by unlawfully refusing to consider job applicants for employment or otherwise discriminating against employees with respect to their hire or tenure of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them under Section 7 of the National Labor Relations Act.

WE WILL offer Dean M. Fizer immediate employment, without prejudice to his seniority and other rights or privileges, in the same or a substantially equivalent position to which he would have been employed if employed absent the discrimination against him, and, if no such position has become available since August 14, 1979, place Dean M. Fizer on a preferential hiring list and offer him the first such position that becomes available.

WE WILL pay Dean M. Fizer any backpay, with interest, which he lost because we refused to consider him for employment on and after August 14, 1979.

KING SOOPERS, A DIVISION OF  
DILLON COMPANIES, INC.

## DECISION

## STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge: This case was heard before me in Denver, Colorado, on December 4, 1980, pursuant to a complaint issued on April 30, 1980, by the General Counsel of the National Labor Relations Board through the Acting Regional Director for Region 27 of the Board. The complaint is based upon a charge filed on February 28, 1980, by Dean M. Fizer, an individual, against King Soopers, A Division of Dillon Companies, Inc. (herein Respondent).

In the complaint, the General Counsel alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act, as amended, on or about September 13, 1979,<sup>1</sup> by Grocery Warehouse Manager Robert Bock's telling Fizer that he would not be rehired because of his former position with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 435 (herein Local 435 or the Union), and Section 8(a)(3) and (1) of the Act by failing and refusing to rehire Fizer since on or about August 14, 1979.

In its answer, Respondent admits the jurisdictional and preliminary allegations, but denies that it has violated the Act in any manner.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the oral argument made by counsel for the General Counsel and counsel for Respondent at the close of the hearing in lieu of briefs, I make the following:

## FINDINGS OF FACT

## I. JURISDICTION

Respondent, a Kansas corporation, operates a chain of retail stores in the State of Colorado where it is engaged in the distribution and sale of groceries and related items. During the past 12 months, Respondent had gross retail sales from such business exceeding \$500,000 and purchased and received goods and materials valued in excess of \$50,000 directly from points outside the State of Colorado. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

## II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

<sup>1</sup> All dates are in 1979 unless otherwise stated.

## III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background<sup>2</sup>

Dean M. Fizer formerly worked for Respondent from October 1975 until December 26, 1978, as a "washer-greaser-tire man" in Respondent's garage.<sup>3</sup> He also drove a truck for Respondent during that period. Fizer voluntarily quit his employment with Respondent to become a business agent and vice president of the Union.<sup>4</sup> On leaving Respondent's employ, Fizer received a form stating that he was eligible for rehire (G.C. Exh. 2).

With respect to the eligible-for-rehire designation,<sup>5</sup> Respondent's vice president of personnel, Edward Belke, testified that the designation simply means that the former employee is eligible to be considered for rehire. The "No" box, he said, is checked where an employee has been discharged or has been deemed guilty of theft, an "altercation with [a] supervisor," or similar "gross misconduct." In short, it apparently means nothing more than that a job applicant is eligible only to be interviewed.<sup>6</sup> I have much difficulty with this interpretation,<sup>7</sup> since it seems to promote an inconsistency.<sup>8</sup> However, there is no contrary evidence.

In conjunction with the foregoing matter, consideration must be given to two disciplinary actions Fizer sustained during his 1975-78 employment with Respondent. The first was a written warning (G.C. Exh. 5(a)) issued on October 25, 1976, for (1) causing \$2,000 in damage to a truck engine by leaving the oil pan plug loose, and (2) improperly rotating tires on a unit and taking twice as long to do it.<sup>9</sup> Fizer refused to sign the warning and filed a grievance (G.C. Exh. 5(b)) over it claiming it to be "unfair and unjust." While the testimony on this point is sketchy, it appears that the warning survived the grievance.

<sup>2</sup> Witness sequestration under Rule 615 of the Federal Rules of Evidence was not invoked by either party.

<sup>3</sup> During his first year, Fizer was laid off twice (presumably for lack of work), once for about 6 weeks and the second time for about 8 or 9 weeks.

<sup>4</sup> Fizer testified that he served as vice president of Local 435 from January through December 1979. As an elected officer, the position of Fizer was paid a nominal sum only. James Ivy, the Union's secretary-treasurer, appointed Fizer to a full-time paid position as a business agent in January. He served as a business agent until the Union terminated him on June 22.

<sup>5</sup> It functions as a question on G.C. Exh. 2. Thus, whether an employee was "Eligible for Rehire had to be checked in the appropriate box, "Yes" or "No." On Fizer's form, the "Yes" box is checked.

<sup>6</sup> Respondent offered no documents supporting Belke's testimony, such as a personnel policy guide or rejected applications in which the applicants had received eligible-for-rehire designations. Belke tended to be evasive at times, and I do not accept his testimony in full.

<sup>7</sup> Belke's interpretation seems to be that an employee's application for rehire can (logically) be rejected on the basis of some incident (less than "gross" in magnitude) in his prior employment with Respondent, even though Respondent, at the time of the employee's departure, had not considered such incident worthy of a "not eligible."

<sup>8</sup> That is, a prior incident is, in effect, forgotten, yet at a later time (on application for rehire) it is reviewed again and may serve as the basis for the rehire applicant's rejection. Fizer, as will be noted below, was not even given an interview pursuant to his rehire application even though the woman who took his application (Respondent's agent for such purpose) told him that his chances were good and that the garage would be hiring drivers.

<sup>9</sup> James C. Moynahan, then garage supervisor, stated on the warning, "I have serious reservation about this employee's ability to fill the job."

As his second discipline, Fizer received a 5-day suspension on October 6, 1977, allegedly (per the document, G.C. Exh. 6) for (1) reporting to work under the influence of alcohol and (2) using abusive language toward Garage Supervisor Steve Large.<sup>10</sup> The suspension notice, which Fizer signed, concludes with the statement, "He is therefore given a 5-day suspension in lieu of termination with the understanding that further incidents of such behavior will be met with his discharge."<sup>11</sup>

As a business agent for the Union, part of Fizer's duties was to service the Union's collective-bargaining agreement with Respondent. Robert Bock, formerly grocery warehouse manager for Respondent,<sup>12</sup> testified that he enjoyed a good working relationship with Fizer when the latter handled grievances and otherwise served as the Union's business agent.<sup>13</sup> Fizer testified that he, as business agent, filed an unfair labor practice charge on behalf of the Union against Respondent. The charge apparently related to seniority. He further testified, without contradiction, that Vice President Belke and Dennis Pressnall, Respondent's director of distribution and transportation,<sup>14</sup> informed him in a meeting with Fizer and the stewards in or about April that if he wanted to get along with Respondent he would drop the charge. Fizer reported the matter to Ivy, his superior, who directed him to withdraw the charge. Fizer complied, but he testified that withdrawal of the charge "did not help the working conditions within the company." These "working conditions" are not further described in the record.

As earlier noted, Fizer was terminated by the Union on June 22. He testified that on July 19 he was all set to be hired by Western Grocers (apparently a firm unrelated to Respondent), and had even passed his medical examination and the Department of Transportation's tests (written and driver's) when Western's grocery warehouse superintendent, Roy Mayberry, told him that Western would not be able to hire him. Mayberry said that the reason was that Neal Duppen, Western's assistant vice president of industrial relations, had informed Mayberry regarding "what had been said and done by the business agents from Local 435 since [Fizer] had left, along with what he [apparently Duppen] had been told by *King Soopers*. (Emphasis supplied.) Fizer asked what Respondent had told Duppen, but Mayberry said that it was confidential.

Fizer then telephoned Respondent and ended up speaking with Tom Nelson of the personnel department. Fizer described the Western situation and asked "what the hell was going on with King Soopers and my em-

<sup>10</sup> Fizer testified that he agreed to the 5-day suspension only because he apparently had used some abusive language toward Moynahan, and that he did not agree with the alcohol allegation. Nevertheless, it does not appear that Fizer contested the suspension.

<sup>11</sup> One might wonder how Fizer, in light of Belke's testimony and Respondent's remarks on the two disciplinary notices, obtained the eligible-for-rehire designation when he left Respondent in December 1978.

<sup>12</sup> Bock left Respondent's employ on December 10, and at the time of the hearing herein he was employed by a firm in Salt Lake City, Utah.

<sup>13</sup> Fizer testified that, during his 1975-78 employment with Respondent, he served as a union steward for 1-1/2 years and processed some grievances. Bock testified that he had no business dealings with Fizer when the latter was Respondent's employee.

<sup>14</sup> Bock testified, in effect, that he reported to Pressnall.

ployment record." Nelson replied that he did not know what Western was saying, and that, when Western called wanting Fizer's employment record, "[W]e told them that you worked for us." (Nelson obviously meant that Fizer had previously worked for Respondent.)

Respondent timely objected to, and thereafter moved to strike, the hearsay testimony regarding Mayberry's quoting Duppen's quoting King Soopers. As counsel for the General Counsel asserted that such information was elicited only as background leading up to a subsequent event (presumably an admissible piece of evidence), I overruled the objection and denied the motion. Counsel for the General Counsel never clarified the relevance of this background. As I attach no weight to this hearsay testimony, or to any of Mayberry's remarks, there is no need for me to reverse my ruling and strike the hearsay reference to Respondent.

#### B. Fizer's Reapplication at King Soopers

It is undisputed that on August 14 Fizer, after standing in line for 45 minutes or so in a drizzling rain with about 100 other job applicants, signed a short form application (G.C. Exh. 7). He testified that he applied for any job, and the form reflects "warehouse—stocker-driver." According to Fizer, he showed the woman taking the applications his eligible-for-rehire notice (G.C. Exh. 2), and she said that he should have no problem coming back in view of the eligibility notice and his previous experience with Respondent, and recommended that he notify Transportation Supervisor William L. Oppy that he had filed his application since Respondent would be hiring some drivers.<sup>15</sup> Fizer testified that he did not know the woman's name or whether she worked in the personnel department.

#### C. Post Application Events

##### 1. The conversation with Transportation Supervisor Oppy

On August 14 or the next day, Fizer telephoned Oppy and reported that he had filed his application. According to Fizer, Oppy replied, "OK, but so what?" In his own testimony, Oppy admitted the "OK" but denied the "so what" portion. While I credit Fizer's version, I do not see that it adds anything for Fizer.<sup>16</sup> Indeed, it seems to detract from the General Counsel's case. That is, the "so what" could have meant one of three or more ideas. First, "[W]e do not have any openings." Second, "I would not hire you if we did." Third, "I don't have anything to do with the hiring" (but at the hearing he testi-

fied that he did). I make no finding as to what Oppy specifically meant by the "so what."<sup>17</sup>

##### 2. The conversations with Grocery Warehouse Manager Bock

Fizer, whom I credit for reasons noted below, testified that on September 13 he telephoned Bock and inquired if he was doing any hiring in the warehouse.<sup>18</sup> Bock replied that he was not at that time because Respondent was transferring people around from department to department under a career opportunity program.<sup>19</sup> Bock then added that it was going to be "damn hard, in fact almost impossible," for Fizer to get rehired "with your position as vice president of the local union and the conditions and the way things are within the union right now." Fizer thanked him for the information and ended the call. On cross-examination, Fizer repeated essentially the same version, but he included the point that Bock said that he knew Fizer's application was on file (Bock's having so heard) and that if he could be of any help he would do so. Fizer also, in the version on cross-examination, changed Bock's "no hiring" statement to "not aware of" any hiring. He further testified:

Q. During this conversation, Mr. Fizer, did Mr. Bock tell you that he wouldn't hire you, did he?

A. No, he did not.

According to Fizer, he next spoke to Bock on January 11, 1980.<sup>20</sup> Having learned in a regular meeting of the Union that Bock had left Respondent, and after obtaining Bock's home telephone number from Jim Golden, frozen food supervisor at Respondent, Fizer telephoned Bock on such date. In the conversation with Bock, Fizer asked him if he would give a written statement concerning their September conversation "of my being refused employment with the company." Bock said that he would have to check on the matter and call Fizer back.<sup>21</sup>

<sup>17</sup> Resp. Exh. 2 is Fizer's March 4, 1980, pretrial affidavit. It was offered and received solely to reflect that at p. 2, par. 2, Fizer reported that "[h]e [Oppy] just said okay." Conceding that the pretrial version did not contain the "so what," Fizer insisted that he reported the phrase when relating the story to the Board agent but that it was not included in the affidavit.

<sup>18</sup> The specific date is supplied by a brief note Fizer made regarding the conversation on a calendar pad bearing such date. The note (Resp. Exh. 1) states: "Called K.S. No jobs avail. Bock said 'Dean it's going to be difficult to put you to work since you are an officer & the way things are going with the Union.'"

<sup>19</sup> Testifying for Respondent, Vice President Belke explained that Respondent had given then-current employees the opportunity to express a desire to transfer to another department and that, wherever possible, preference was given to such requests before vacancies were filled by outside hires.

<sup>20</sup> G.C. Exh. 3 is Fizer's notes of January 11. These notes reflect, besides a call to Bock at 8 a.m., a call at 8:20 a.m. to Respondent when he asked "Doty" to check on whether his application was still being considered. She said that they had 10,000 applications on file and not enough time to check on where his stood. Fizer also testified to the same event except in his testimony he could not recall "Doty's" name. Fizer testified that Respondent employs several thousand employees and has contracts with several different unions.

<sup>21</sup> Fizer's January 11, 1980, note (G.C. Exh. 3) on this, offered and received (over objection) only as corroboration and not as affirmative evidence, reads:

<sup>15</sup> The application was completed in pencil, and the portion relating to past employment at Respondent is circled in red ink. At the top, in red ink, appear the words "14 yrs. Exp." Underneath those words, in a set of four boxes marked "For Office Use Only," appear the symbols "5," "TD," "SW," and "2." These symbols are not explained in the record, and I am left to speculate as to whether the symbols are favorable, unfavorable, or whatever regarding Fizer's application.

<sup>16</sup> Fizer and Oppy both testified that each waited for the other to speak (after the opening and disputed words), and then they both hung up at or about the same time.

On January 14, 1980,<sup>22</sup> Bock called Fizer and reported that Pressnall said that he, Bock, could not give a statement since he no longer represented Respondent. Bock added that he had two more checks coming from Respondent and he did not want to jeopardize them. Fizer told Bock that he was preparing to file charges against Respondent and asked if Bock would be a witness for him. Bock said that he would be moving from Colorado soon, but he wished Fizer the best of luck with his charges.<sup>23</sup>

Bock's version is quite different. He testified that he and Fizer had six telephone conversations. While he changed the dates several times during his testimony, it appears that he finally settled on: One in late June or early July 1979; one in August; one on September 13; one in late September or early October; and two in January 1980.

I shall not burden the record with tracking Bock's many changes and switches during his testimony after cross-examination began. Not only did he correct dates (a not uncommon matter for anyone), but he also changed events and contradicted himself. For example, he testified that he spoke to Fizer once in Respondent's lunchroom in a brief "hello"-type conversation in August or September, but that Fizer did not ask for a job. On being shown a letter (G.C. Exh. 9) he wrote on April 15, 1980, to Mary Lynn Feldman, Respondent's personnel director, he changed his testimony and admitted that on such occasion Fizer did request to be rehired. He testified that probably Supervisor Jim Golden was present at the cafeteria conversation.<sup>24</sup>

Turning now to Bock's version (which I do not accept where not in conformity with Fizer's testimonial version), we learn that Fizer's initial call (June-July) to Bock was simply to report on his termination by the Union. In one of the next conversations Fizer reported

that he planned to sue Local 435. In one conversation, but prior to the August 14 application, Fizer called Bock, reported the incident involving Western Grocers, and stated that Local 435 had blacklisted him at Western, and that he would like to return to King Soopers. Bock told him to file an application.

About September 13, Fizer called and reported that he had filed his application. Bock told him that Respondent was not then hiring because it was moving people around under the career opportunity program, but that he would "get back" with Fizer as soon as possible.

Bock testified that the subject of the September-October call was simply a report by Fizer about the "proceedings he was taking against the Union and against Western Grocers" regarding the blacklisting, and that the application was not mentioned.

Coming to the January conversations, Bock testified that in the first one (January 11, 1980) Fizer requested a letter confirming that he had been a good business agent in order to use the letter in his suit against the Union.<sup>25</sup> Bock said that he would have to check with Pressnall.

In the second January conversation, Bock told Fizer that Pressnall had vetoed the idea of Respondent's getting involved in Fizer's lawsuit with the Union.

Bock denied that the September conversation came up in the January conversations, and further denied saying in the September 13 conversation, or any conversation, that Fizer would have difficulty being rehired because of his position with the Union. In fact, Bock denied making any reference to Fizer's position with the Union.

As earlier noted, I credit Fizer over Bock. Although Fizer's testimony is not a model of precision and consistency, it is more so than Bock's, and I was more impressed with the demeanor of Fizer than that of Bock.

#### *D. Other Evidence of Animus—Steve Large's "Troublemaker" Remark*

Paul D. Woolsey, a member of Local 435, has been employed by Respondent as a mechanic for 3-1/2 years. He works for Garage Supervisor Steve Large. Called by counsel for the General Counsel, Woolsey testified that at some point after Fizer left Respondent's employment in December 1978, and prior to Fizer's June 22, 1979, termination by the Union as a business agent, Large stated to Woolsey that "we'd got rid of the troublemaker."<sup>26</sup> Since no one had left the garage around that time, Woolsey asked Large to whom he was referring, and Large replied, "Dean Fizer."<sup>27</sup>

Large's remark may be subject to several interpretations, but in view of the confrontation which developed in April after Fizer filed a charge with the Board against Respondent, the two interpretations which appear to be the most likely are: (1) Large (or other officials of Re-

Called Bob Bock and asked him to give me statement that they couldn't hire me because of the way union was being run and my being vice president. Said he was still on company payroll & would have to check with Dennis Pressnall to see if he could do this, but he would get back in touch with me over the weekend. Also said this was the reason why I hadn't been hired. Agreed to this same thing as he had told me this in September 79.

<sup>22</sup> The specific date is supplied by G.C. Exh. 4, a contemporaneous note made by Fizer concerning his telephone conversation with Bock of such date. This exhibit was offered and received (over objection as a self-serving hearsay document) on the same basis as G.C. Exh. 3.

<sup>23</sup> G.C. Exh. 4 also refers to a reference by Bock to grievances being filed by warehouse personnel at King Soopers. Bock apparently considered the grievances frivolous.

<sup>24</sup> Bock's April 15, 1980, letter to Feldman, written after Fizer had filed the charge herein on February 28, 1980 (and presumably in relation to Respondent's own investigation of the charge), reads:

I would like to put in writing the comments I had with Dean Fizer when he asked me for a job.

Dean asked me at least two or three times if I could put him back on the payroll. Each time I told him he would have to go through personnel. He also asked me if there was any reason I couldn't hire him and, of course, I told him no. At least one of the times he asked me for a job, Jim Golden was present and aware of the full conversation. As I am well aware of discrimination policies and guidelines set by the personnel department, I did not, at any time, ever tell Dean we could not hire him because he was an ex-union business agent.

If subpoenaed, I would be willing to testify exactly to what I've written.

<sup>25</sup> Fizer reportedly said that Local 435 had accused him of being 6 months behind on his paperwork, and that Fizer wanted Bock's letter to include the statement that he thought Fizer was current on his union work.

<sup>26</sup> There is no complaint allegation regarding this remark.

<sup>27</sup> Large did not testify. Woolsey could not recall what led up to this comment. If Large clarified his remark, Woolsey did not report it in his testimony. The record does not reflect whether any witnesses were present.

spondent) had complained to Ivy at Local 435 and thereafter learned that Fizer would be terminated; or (2) while Respondent had made no complaint or suggestion to the Union regarding Fizer, Large had learned that the Union was about to dump Fizer. Although Woolsey's best recollection was that Large's remark came before Fizer's termination by the Union, I have no problem placing the event in the past tense. Woolsey was not firm in his recollection, and Large's comment really suggests a completed event which had just happened. In any event, Large's comment about a "troublemaker" reflects animus whether it came before or after Fizer's discharge by the Union from his business agent position.

Aside from the question of timing, the next question is whether (1) or (2) above is the more probable. That is, did Respondent have only a passive animus (the second interpretation above) or did it take aggressive action (the first interpretation above)? As Fizer's June 22 termination came only about 2 months after his confrontation with two high officials of Respondent (Belke and Pressnall), practically shaming Fizer in the presence of his stewards, I am compelled to conclude that Large's remark meant that Respondent took some affirmative action to get Fizer removed from his business agent position and out of Respondent's corporate hair.<sup>28</sup>

#### E. Hiring After Fizer's Application

The only testimony regarding whether Respondent hired anyone in the categories Fizer applied for came during counsel for the General Counsel's cross-examination of Belke and Bock.<sup>29</sup> His attempt to question Transportation Supervisor Oppy on this subject during cross-examination was denied when I sustained Respondent's objection that such questions were beyond the scope of the direct examination.<sup>30</sup>

Belke testified that he did not know whether any truckdrivers were hired after August 14, and that he did not think he had any records in the courtroom which would reveal whether any were hired. When asked, "Do you know of any employees that were hired after August 1979," Belke answered, "I know there were—I don't

specifically know the numbers, but I know that we've hired people since '79."<sup>31</sup>

Bock testified that he could not recall whether any employees were hired in the warehouse in September or October.<sup>32</sup> When asked about November, he replied that he was sure that some were hired "at the end of the year, yes."

#### F. Analysis and Conclusions

In oral argument, Respondent's counsel stressed, among other points, the admitted fact that Bock (and Respondent) never told Fizer that he would not be hired. Counsel argued that there was no evidence of a refusal to rehire. He confirmed that Respondent chose not to offer evidence on whether Respondent considered and rejected Fizer's application because of its view that such matter was the General Counsel's burden—a burden not carried.

Addressing first the independent 8(a)(1) allegation of complaint paragraph 9 (i.e., Bock told Fizer he would not be rehired), I note that Fizer, on cross-examination, clearly answered, "No, he did not," to the question of whether Bock (in the September 13 conversation) said that he would not rehire Fizer.<sup>33</sup> Counsel for the General Counsel did not move to amend complaint paragraph 9, nor did she make a closing motion to conform the complaint pleadings to the evidence. Nevertheless, Fizer's credited testimony shows a violation in almost the same words alleged.<sup>34</sup> Certainly, the evidence is of the same character as the allegation. As the difference is not a material variation, I shall order Respondent to cease and desist from such conduct and to post an appropriate notice to employees.

Turning now to the alleged failure to rehire, I find that the General Counsel has established that Respondent expressed an aggressive animus by Respondent (based upon the remarks of Large and Bock) toward Fizer. Because of the aggressive animus I have found, I further find that Fizer's rehire application was an exercise in futility. Thus, at least *prima facie*, it actually was an "impossibility"<sup>35</sup> for Fizer to be rehired because of his past union function,<sup>36</sup> and not because of the earlier disciplinary actions against him.

In terms of *Wright Line*,<sup>37</sup> I find that the General Counsel has established a *prima facie* case that Respondent refused to rehire Fizer because of his positions in the

<sup>28</sup> Recall that Fizer testified that withdrawal of the charge in April did not improve working conditions at the Company. While Bock had a good relationship with Fizer, Large quite obviously did not.

<sup>29</sup> Counsel for the General Counsel called no witnesses under Rule 611(c) of the Federal Rules of Evidence and apparently had not issued a *subpoena duces tecum* for production of hiring and/or transfer records on and after August 14, 1979, the date of Fizer's application. Respondent's counsel, in view of the state of the evidence, asserted in his closing argument that Respondent chose not to call witnesses on the subject.

<sup>30</sup> Oppy's direct examination was limited to the following:

Q. [By Mr. Siebert] Mr. Oppy, by whom are you employed?

A. King Soopers.

Q. Mr. Oppy, did you have a telephone conversation with Mr. Dean Fizer somewhere around mid-August of 1979?

A. Yes.

Q. Could you relate that phone conversation to us, please?

A. Mr. Fizer called and explained to me that he had put in an application. I told him okay, there wasn't anything said for a little bit and I told him thank you for calling and that was the end of the conversation.

MR. SIEBERT: No further questions.

<sup>31</sup> As can be seen, it is unclear what time period Belke was referring to, and no departments or classifications are mentioned.

<sup>32</sup> It must be remembered that Bock's testimony was on December 4, 1980, over a year after the months he was asked about.

<sup>33</sup> While the distinction can be made that the question focused on Bock rather than Respondent, even Fizer's version never quoted Bock in the explicit negative alleged in paragraph 9.

<sup>34</sup> Thus, Bock said that it was going to be "damn hard," indeed, "almost impossible" for Fizer to get rehired because he was an officer of the Union and because of the way "things are within the Union" and "the way the Union is being run at the present time."

<sup>35</sup> Bock's phrase of "almost impossible," as quoted by Fizer, is essentially the same in view of all the circumstances.

<sup>36</sup> Although Bock apparently referred to Fizer's position of vice president, the "troublemaker" position Fizer had was that of business agent. The difference is immaterial here.

<sup>37</sup> *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

Union, and that Respondent has failed to rebut<sup>38</sup> such case by demonstrating that Fizer would not have been rehired regardless of his union functions.<sup>39</sup>

Accordingly, I find that Respondent refused to rehire Fizer in violation of Section 8(a)(3) and (1) of the Act, and I shall order that it offer him a position for which he applied, discharging, if necessary, any employee hired in such position after August 14, 1979, and that it make him whole for any earnings he lost as a result of the discrimination against him.<sup>40</sup>

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(a)(1) of the Act by telling an employee that it would be difficult and almost impossible to be rehired because of his functions as an officer of the Union.

4. Respondent has violated Section 8(a)(3) and (1) of the Act by refusing to rehire Dean M. Fizer on and after August 14, 1979.

5. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take the affirmative action set forth below to effectuate the policies of the Act.

It having been found that Respondent unlawfully discriminated against Dean M. Fizer with respect to his reemployment application, it will be recommended that Respondent be required to offer him reemployment in the same position in which he would have been rehired absent the discrimination against him, if such position became available after the filing of his application, discharging, if necessary, any employee hired after August 14, 1980, and, if no such position has become available, in a substantially equivalent position which may have become available. In the event neither of such positions

<sup>38</sup> Under *Wright Line*, Respondent had the burden of going forward with the evidence and, with what amounts to an affirmative defense, rebutting the General Counsel's case.

<sup>39</sup> Such rebuttal effort might have taken the form of testimony by Belke, Bock, or others that Fizer's application was considered and rejected because of his two prior disciplinary actions. I need not decide whether such effort, if made, would have been persuasive.

<sup>40</sup> Whether an opening did occur following Fizer's application, and the amount of backpay due, are matters to be resolved at the compliance stage. *Alexander Dawson, Inc. d/b/a Alexander's Restaurant and Lounge*, 228 NLRB 165 (1977), enf'd, 586 F.2d 1300 (9th Cir. 1978). As Fizer's reemployment application, for unlawful reasons, was predestined to failure, and as Respondent waived its opportunity in this proceeding to offer evidence that it considered and rejected Fizer's application for lawful reasons, Respondent is foreclosed from raising at the compliance stage any contention that it would have rejected Fizer's application on the merits. Thus, the issues to be resolved at the compliance stage are determining (1) if there was a job vacancy at the time of or following Fizer's application and (2) the amount of backpay due.

have become available, Respondent shall place Dean M. Fizer's name on a preferential hiring list and offer him employment in the first such position it would have reemployed him absent any unlawful considerations.

I also shall recommend that Respondent be required to make Dean M. Fizer whole for any loss of earnings he may have suffered by reason of Respondent's failure to accord him nondiscriminatory consideration for employment in the manner outlined above. Backpay shall be computed in accordance with *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

#### ORDER<sup>41</sup>

The Respondent, King Soopers, A Division of Dillon Companies, Inc., Denver, Colorado, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Telling job applicants that it will be very difficult and almost impossible for them to be rehired as employees because of their activities as officers or staff representatives of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 435, or any other labor organization.

(b) Discouraging membership in, or activities as an officer or staff representative of, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 435, or any other labor organization, by unlawfully refusing to rehire job applicants as employees or discriminating against employees in any other manner with respect to their hire or tenure of employment in violation of Section 8(a)(3) of the Act.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 435, or any other labor organization, to bargain collectively through representatives of their own choosing, to act together for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

2. Take the following affirmative action which will effectuate the purposes of the Act:

(a) Offer reemployment to Dean M. Fizer and make him whole for any loss of pay that he may have suffered by reason of Respondent's unlawful refusal to rehire him in accordance with the recommendations set forth in the section of this Decision entitled "The Remedy."

<sup>41</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its Denver, Colorado, plant copies of the attached notice marked "Appendix."<sup>42</sup> Copies of said

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<sup>42</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

notice, on forms provided by the Regional Director for Region 27, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 27, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.